Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1662

W. W. BLACKBURN and JERRY BLACKBURN, Individually and d/b/a Tiny Blackburn Agency,
Petitioners,

vs.

CRUM AND FORSTER, WESTCHESTER FIRE INSURANCE COMPANY, THE NORTH RIVER INSURANCE COMPANY, INTERNATIONAL INSURANCE COMPANY, COMMONWEALTH COUNTY MUTUAL INS. CO., U. S. FIRE INSURANCE CO. AND FLOYD WEST & COMPANY,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Petitioners pray that a writ of certiorari issue to review the order and judgment entered in this case on February 1, 1980, by the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The order, judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered February 1, 1980, is set forth in the Appendix, Pg. A-1 and the opinion is reported at 611 F.2d 102. The

order of the United States District Court for the Northern District of Texas entered on the 9th day of January, 1979 is set forth in the Appendix, Pg. A-8, the decision is not reported.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was made and entered on February 1, 1980. Petitioners' Motion for Rehearing was denied March 6, 1980. The jurisdiction of this Court is invoked under and pursuant to 28 U.S.C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Does the "per se rule" as it is applied under the antitrust laws apply to six insurance corporations' concerted refusal to deal (boycott) with Petitioners, a single insurance agency.

2. Does this Court's holdings in *Silver v. New York Stock Exchange*, 373 U.S. 341, 83 S.Ct. 1246, 10 L.ED.2d 389 (1963) and *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959) require that a boycott be on a horizontal level in order to be a per se violation of the Antitrust laws.

3. In regulated industries, such as insurance, does a vertical boycott allow application of the per se rule.

STATUTORY PROVISIONS INVOLVED

This case involves Section I of the Sherman Act, 15 U.S.C. §1 which provides in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

and the McCarran-Ferguson Act, 15 U.S.C. §1013(b) relating to the insurance industry exemption which states as follows:

> "(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

STATEMENT OF THE CASE

1. Proceedings in the District Court

This suit was originally filed on February 23, 1977, in the Northern District of Texas. Jurisdiction was asserted by Petitioners pursuant to Title 28 U.S.C., §§1331 and 1337 and Title 15 U.S.C. §§1, 2, 3, 4, 14, 15, 16, 18 and 26 and 1013-b, as an action under the Federal Antitrust Laws (Sherman, Clayton and McCarron-Ferguson Acts) with amounts in controversy exceeding $10,000.00.

The facts of the case are essentially undisputed. Petitioners, Plaintiffs in the Trial Court, were a father and son insurance agency. Crum and Forster is an insurance management corporation. Floyd West & Company is the Texas management corporation for all Respondent Companies; Westchester Fire Insurance Company, The North River Insurance Company, International Insurance Company and Commonwealth County Mutual Ins. Co. had for twelve (12) years

contracted with the Petitioners to supply insurance for sale to the public; U. S. Fire Insurance Co. had provided Errors and Omissions coverage for the Petitioners for many years.

In March of 1976 the contract to provide insurance was terminated by the four insurance providers ostensibly over a dispute between Petitioners and North River Insurance Company, one of the providers. Approximately two months later the separate contract with U. S. Fire Insurance Company for Errors and Omissions coverage on Petitioners was terminated.

The District Court granted Respondents' Motion for Summary Judgment, a copy of the Court's opinion appears in the Appendix Pg. A-8, stating that Petitioners' cause of action could not be a per se violation of the Sherman Antitrust Act, and that Petitioners could not prevail under the rule of reason test.

2. The Decision of the Court of Appeals

Petitioners appealed to the United States Court of Appeals for the Fifth Circuit on the grounds that the District Court erred in holding on Motion for Summary Judgment that as a matter of law the petitioners did not have an antitrust claim.

The Court of Appeals affirmed the judgment of the Trial Court (contained in Appendix Pg. A-1.) basing their opinion on the fact that the boycott was a vertical rather than horizontal boycott and therefore could not be a per se violation, and that there was insufficient evidence under the rule of reason test to sustain Petitioners' cause of action.

REASONS FOR GRANTING THE WRIT

One of the more recent decisions of this Court in the area of boycotts, *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531, 98 S.Ct. 2923, 57 L.Ed.2d 973 (1978) bears close examination as the similarities between it and the present case are striking. *St. Paul* sets out that:

> "The generic concept of boycott refers to a method of pressuring a party with whom one has a dispute by withholding, or enlisting others to withhold, patronage or services for the target. at 2930
>
> This Court has held unlawful concerted refusals to deal in cases where the target is a customer of some or all of the conspirators who is being denied access to a desired good or service because of a refusal to accede to particular terms set by some or all of the sellers. See e.g., *Paramount Famous Corp. v. United States*, 282 U.S. 30, 51 S.Ct. 42, 75 L.Ed. 145 (1930); *United States v. First Nat. Pictures, Inc.*, 282 U.S. 44, 51 S.Ct. 45, 75 L.Ed. 151 (1930); *Binderup v. Pathe Exchange*, 263 U.S. 291, 44 S.Ct. 96, 68 L.Ed. 308 (1923). See also *Anderson v. Shipowners Assn.*, 272 U.S. 359, 47 S.Ct. 125, 71 L.Ed. 298 (1926). As the Court put it in *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211, 214, 71 S.Ct. 259, 261, 95 L.Ed. 219 (1951), 'the Sherman Act makes it an offense for [businessmen] to agree among themselves to stop selling to particular customers.'" at 2931.

The applicability of the above to the present case is apparent. Because of a disagreement with one insurance company, i.e., refusal to place a loss on an un-

involved insurance company, five of the Respondent Companies cancelled Petitioners' agency-company contract. Later, Petitioners' Errors and Omissions coverage of long standing was cancelled by a sixth of the Respondent Companies in spite of the fact that it was under a separate contract. Then, Respondents refused to issue an Errors and Omissions policy through the Texas Association of Independent Agents as was their agreement even after Petitioners had been cleared of any wrongdoing in this single dispute with one of the Respondent Companies. These actions put Petitioners out of business.

> "[T]he purpose of the boycott, coercion and intimidation exception [to McCarran-Ferguson] was solely to protect *insurance agents* or other insurance companies from being 'black listed' by powerful combinations of insurance companies . . ." *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531, 98 S.Ct. 2923, 57 L.Ed. 2d 932 (1978). Emphasis added)

The Fifth Circuit Court of Appeals points out in their February 1, 1980 opinion that the Supreme Court has required the application of the per se rules to all explicit concerted refusals to deal, citing *Silver v. New York Stock Exchange*, 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963) and *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959) as supporting authority. However, the Court then differentiates these cases by stating that there was a "horizontal boycott aspect" in the Supreme Court cases not found in the present case (at 104). In this respect Petitioners would show

the Court misapplied these holdings to the present case.

Petitioners would show that in *Silver*, no horizontal conspiracy was involved. Instead, there was an action by an individual stockholder against the New York Stock Exchange for their refusal to allow the petitioners an information "tie-in" to the Stock Exchange. Both the New York Exchange and the individual members of the Exchange, through which the tie-in was accomplished, were supplying a service to, rather than competing directly with, Silver; hence a vertical boycott. This situation is directly analogous to the present case. There is no dispute that all of the Respondent Insurance Companies boycotted Petitioners. As in *Silver*, this boycott involved suppliers and the party being supplied.

The Fifth Circuit states that the fact that there was a business dispute between North River Insurance Company (one of the six defendants) and the Petitioners "defeats the charge of per se liability," however, the facts are undisputed that *all* of the Respondent Insurance Companies — each separately incorporated—terminated Petitioners. This termination was without regard to any set procedure and was taken as a concerted action by all of these separate and distinct companies.

Had six distributors of appliances as in *Klor's v. Broadway Stores, Inc.*, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959) decided to stop selling to one retailer because of a disagreement with one of the distributors, there would be no question that an anti-

trust violation occurred. How then can the present case be differentiated.

The fact that in *Klor's*, one out of many defendants was on a horizontal level with the plaintiff, cannot be adopted as a hand-hold to lessen the protection of this Court's prior holdings. In the present case several separate businesses (insurance companies) got together and concertedly refused to deal with a single agent for reasons involving only one of the companies. *Klor's* states that:

> "Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations they were reasonable in the specific circumstances, . . ." (at 212) (citations omitted)

Per se violations were described by Justice Black in *Northern Pacific Railroad Co. v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958) as:

> ". . . agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."

A boycott took place in this action. Boycotts fall within those cases which have no redeeming value and are therefore per se violations. The cases cited by the Fifth Circuit as supporting their "horizontal aspect" differentiation do not involve boycott.

In Summary proceedings, as in the present case, the materials lodged on behalf of the movant must be viewed in the light most favorable to the Petitioners (Blackburns). *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970). Further, this court has said:

> ". . . summary judgment procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators . . ."

Poller v. Columbia Broadcasting Systems, Inc., 368 U.S. 404, 82 S.Ct. 486, 7 L.Ed. 417 (1962) There is no question that a boycott occurred. The regulated industry (insurance) involved in this case relates back to *Silver*, another regulated industry case, which shows that an even higher degree of care or some procedural safeguards must be shown where separate entities within a self-regulated or state-regulated industry undertake to boycott an individual (at 1259). Where self or state regulation is provided for, and broad exemptions are allowed, conduct falling without these exemptions should be scrutinized carefully. Taking this into account, to allow the use of summary judgment proceeding would be contra to this Court's prior holdings and would effectively deny the protection of the McCarran-Ferguson Act to any insurance agent, the class for whom the act was designed to protect.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be granted to review the order, judgment and opinion entered on February 1, 1980 by the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

JOHN WRIGHT & ASSOCIATES

By----------

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CERTIFICATE OF SERVICE

I hereby certify that on this ..... day of ....., 1980, three copies of the Petition for Writ of Certiorari were mailed, postaged prepaid, to Mark Martin and Ernest R. Higginbotham, 1200 One Main Place, Dallas, Texas 75250, counsel for the Respondents.

JOHN WRIGHT

Appendix 1

W. W. BLACKBURN and Jerry Blackburn, Individually and d/b/a Tiny Blackburn Agency, Plaintiffs-Appelants,

v.

CRUM & FORSTER et al,
Defendants-Appellees.

No. 79-1648.

United States Court of Appeals,
Fifth Circuit.

Feb. 1, 1980.

Appeal from the United States District Court for the Northern District of Texas.

Before GOLDBERG, FAY and ANDERSON, Circuit Judges.

FAY, Circuit Judge:

Appellant insurance agents, W. W. Blackburn and Jerry Blackburn, challenge an adverse summary judgment in their suit charging the insurer appellees with a concerted refusal to deal violative of section 1 of the Sherman Act, 15 U.S.C. § (1976).[1] We agree with the trial judge that the record evidence, garnered in near-

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[1] During oral argument appellants' counsel conceded that 15 U.S.C. §2 (1976) has no place in this litigation, although monopolization attempts violative of §2 had been alleged. As pertinent to this appeal, 15 U.S.C. §1 (1976) provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . .

ly two years of discovery and presented at the summary judgment, utterly fails to establish the rudimentary elements of an unlawful group boycott. Overcoming a conceded judicial reluctance to approve summary disposition of antitrust actions, we affirm the judgment of the district court.

From April, 1970, to April, 1976, the Blackburns were independent insurance agents for appellee insurance companies. The insurers, affiliated through their common holding company and co-appellee Crum & Forster, refused to sell insurance through the Blackburns after a serious business dispute between appellee North River Insurance Company and the agents. Additionally, appellee U.S. Fire Insurance Company, also part of Crum & Forster's holdings, refused to provide the Blackburns with Errors and Omissions insurance, which protects insurance agents from liability to insureds for mistakes and unwarranted delay in issuing policies. Because the Blackburns' agency contract was cancelled for fraud, other insurance companies were reluctant to use them as their agents. Eventually, the Blackburns sold their deteriorating business.

The rift in the parties' previously amicable business relationship occurred when a warehouse burned while its insurance coverage was being transferred from a competing insurer, The Hartford Company, to the appellee insurer North River Insurance Company. North River claimed that without any prior authority the agents issued an insurance policy shortly after the warehouse burned. Asserting that it

never received from the agents any verbal or written request for coverage, North River refused to pay the claim and cancelled the agency contract, alleging fraud. The Blackburns, however, argued that North River had given verbal permission to issue a policy, with protection effective from November 1, 1975. They further claimed that they issued a binder[2] and mailed copies to North River, destroying their own copies of the binder when they issued the policy, as was customary. Thus, the Blackburns had no tangible evidence of the verbal permission which North River claimed never to have granted.

From this legitimate business conflict[3] spring the Blackburns' antitrust charges. The Blackburns believed that the root of the insurers' discontent was not the alleged fraud, but rather the diminishing proportion of the agents' insurance business that the insurers had been enjoying. According to the Blackburns, the insurers terminated the agency contract and cancelled the Errors and Omissions policy not only to prevent the agents from serving other insurance companies but also to make an example of the Blackburns that would deter other independent agents from serving the insurers' competitors. Consequently, the Blackburns filed suit, alleging an illegal group boycott by Crum & Forster and its insurance companies. They appeal from summary judgment for the insurers.

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[2] An insurance binder is a memorandum of the insurance coverage agreement. It extends protection to the insured pending issuance of the policy, while the insurer is investigating the risks and setting appropriate premium rates. *See* Black's Law Dictionary 213 (4th ed. 1957).

[3] Litigation of the contractural dispute is pending in the Texas courts. We express no opinion regarding the merits of those separate issues.

[1] Although the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1976), exempts the insurance industry from the antitrust laws, section 3(b) of the Act, *id.* § 1013(b), re-erects against insurance companies the antitrust barriers to anticompetitive group boycotts.[4] *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531, 541, 98 S.Ct. 2923, 57 L.Ed.2d 932 (1978). To ascertain whether the insurers in this case transgressed those strictures, we initially consider whether their conduct is per se illegal. We review the record evidence in the light most favorable to the appellant agents. *See Response of Carolina, Inc. v. Leasco Response, Inc.*, 537 F.2d 1307, 1319 (5th Cir. 1976). Clearly, related insurance companies and their holding company could wage an unlawful group boycott. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 141-42, 88 S.Ct. 1981, 20 L.Ed.2d 982 (1968) (holding that common ownership of separate corporations does not preclude suit under the antitrust laws); *Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20, 34 n.49 (5th Cir.), *cert. denied*, 439 U.S. 876, 99 S.Ct. 214, 58 L.Ed.2d 190 (1978) (similar).

It is true that certain Supreme Court boycott cases can be read broadly to require the application of the per se rule to all explicit concerted refusals to deal. *See, e.g., Silver v. New York Stock Exchange*, 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963);

[4] 15 U.S.C. §1013(b) provides:

Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

Klor's Inc. v. Broadway-Hale Stores, Inc. 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959). Such an expansive reading may truy be proper in cases like those before the Supreme Court in which the plaintiff, the excluded party, is on the same competitive level with one member of the conspiracy. In other words, in such cases it may be proper to infer anti-competitive motive and effect because the conspiracy had a horizontal aspect.

[2, 3] This case, however, provides a sharp contrast. All members of the supposed conspiracy are suppliers of insurance. None competes with the plaintiff, an insurance broker. Accordingly, this case contains no horizontal aspect, but involves only a vertical action undertaken by suppliers, the insurance company defendants, against their agent, the insurance broker plaintiff. The per se rule is therefore inapplicable, and the plaintiff must prove that the defendants acted with an anticompetitive motive. *See, e. g., Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164, 168 (3d Cir. 1979); *Marquis v. Chrysler Corp.*, 577 F.2d 624, 640 (9th Cir. 1978); *Southern Distributing Co., Inc. v. Southdown, Inc.*, 574 F.2d 824 (5th Cir. 1978); *E. A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Committee*, 467 F.2d 178 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109, 93 S.Ct. 912, 34 L.Ed.2d 690 (1973). The Blackburns' evidence, however, yields inadequate proof of the insurers' intentional attempts to circumscribe competition among independent insurance agents or among its competitors. *See E. A. McQuade Tours, Inc. v. Consolidated Air Tour Manual*

Committee, 467 F.2d at 187. After nearly two years of discovery, the Blackburns produced no more than their own uncorroborated allegations that the insurers cooperated either to punish the Blackburns for serving other insurance companies or to make an example of the agents that would deter other independent agents from serving the insurors' competitors. Moreover, evidence of the parties' legitimate business dispute defeats the charge of anticompetitive animus. Absent some malevolent intent, the insurers' conduct cannot be labelled per se illegal. *See id.*

[4] Having cleared the first hurdle of the antitrust barriers, the insurers' refusal to deal next must pass muster under the rule of reason. *See id.* at 185, 188. Again we find nothing in the record to indicate an unreasonable restraint of trade. The insurers chose to sever their relationship with agents whose actions they deemed fraudulent. The decision by U.S. Fire Insurance Company to terminate the Errors and Omissions policy denotes only the company's resolution not to protect agents whose alleged faulty records or fraudulent proclivities would subject the insurer to frequent claims or litigation. We need not resolve the contractual controversy to preceive that such a dispute would permit reasonable insurers to terminate a relationship with their agents.

We acknowledge that the events surrounding the parties' dispute engender many issues of material fact. Resolution of those issues, however, is not for a federal forum. Notwithstanding the rule circumscribing summary disposition of antitrust cases, the trial

court's ruling in this case accurately reflects the paucity of "significant probative evidence" bolstering the agents' allegation of illegal group boycott. *See Aladdin Oil Co. v. Texaco, Inc.*, 603 F.2d 1107, 1110-12 (5th Cir. 1979); *Solomon v. Houston Corrugated Box Co.*, 526 F.2d 389, 393-94 (5th Cir. 1976). Accordingly, that judgment is AFFIRMED.

Appendix 2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA-3-77-0249-D

W. W. BLACKBURN AND JERRY BLACKBURN,
Individually and d/b/a
TINY BLACKBURN AGENCY,
Plaintiffs

V.

CRUM AND FORSTER,
WESTCHESTER FIRE INSURANCE COMPANY,
THE NORTH RIVER INSURANCE COMPANY,
INTERNATIONAL INSURANCE COMPANY,
COMMONWEALTH COUNTY MUTUAL
INSURANCE COMPANY,
UNITED STATES FIRE INSURANCE COMPANY
and FLOYD WEST & COMPANY,
Defendants

ORDER

Came on for consideration defendants' motion for summary judgment. Having reviewed the briefs and considered the arguments of counsel and the testimony presented at the hearing of this motion on October 25, 1978, the court is of the opinion that defendants' motion should be granted.

Plaintiffs allege that defendants have engaged in a group boycott, a *per se* violation of §1 of the Sherman Antitrust Act. They rely upon *E. A. McQuade*

Tours, Inc. v. Consolidated Air Tour Manual Committee, 467 F.2d 178, 187 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973) which summarized the concept of "group boycott" by describing three categories into which the cases have placed the concept. The third category includes "combinations designed to influence coercively the trade practices of boycott victims, rather than to eliminate them as competitors." Plaintiffs contend that their suit falls within this third category because defendants combined to destroy their insurance agency in retaliation for writing increasingly higher dollar amounts of insurance for a competitor. Even assuming that plaintiffs have made out a fact issue as to this proposition, the court finds that they have not presented sufficient evidence to support submission to the jury of the question whether defendants' conduct constitutes a "group boycott."

McQuade's categorizations must be read in the light of the cases underlying them and the purpose of the *per se* doctrine. The leading case in the third category, *Fashion Originators Guild of America v. FTC*, 312 U.S. 457 (1941) involved an elaborate scheme by a group of original dress designers to coerce retailers into refusing to deal with competing suppliers who had "pirated" their designs. The *per se* rule applies to "group boycotts" because they always harm competition and any offsetting benefit can be achieved by means less harmful to competition. Sullivan, ANTITRUST, §85 at 240 (1977). Care should be taken, therefore, not to classify conduct which fits the form of a boycott but which does not have the substantive

effect on competition of a classic boycott as a "group boycott" deserving *per se* treatment. *Id.* at §90, at 256. In *McQuade*, the Fifth Circuit stated that "resort to the *per se* rule is justified only when the presence of exclusionary or coercive conduct warrants the view that the arrangement in question is a "naked restrait of trade." *McQuade, supra*, 467 F.2d at 178.

This action must fail, as did *McQuade*, because plaintiffs can not show that defendants sought to achieve some anticompetitive goal by conduct adverse to them. By terminating plaintiffs, defendants did not restrain competition with other insurance companies, but rather, compelled plaintiffs to seek representation of their competitors. There is no evidence that defendants used or contemplated plaintiffs' termination as an example of what might befall independent agents who did too much business for insurance companies outside their group.

Plaintiffs mainly complain that the way in which defendants chose to terminate them — for fraud — coupled with the termination of their errors and omissions coverage by defendant U. S. Fire Insurance Company was designed to put them out of business. They do not show, however, how defendants could have improved its competitive position by their termination. The court can only speculate, without factual basis, that defendants had the unlikely motive of restraining competition with other insurance companies by keeping plaintiffs from representing them. Plaintiff Jerry Blackburn testified to the contrary that other insurance companies were not taking on new

agents when the Blackburn agency was terminated. Jerry Blackburn Deposition at 160. Further, there is again no evidence that defendants used or contemplated the adverse actions taken against plaintiffs as a threat against other agents representing them.

This case is far removed from *Fashion Originators Guild of America, supra.* Plaintiffs' complaint that defendants combined to destroy their business does not make out a *per se* violation of the Sherman Antitrust Act. The court further finds that, as a matter of law, plaintiffs cannot prevail under the rule of reason because there is insufficient evidence of an anticompetitive motive and impact.

Defendants' moton is granted.
It is so ORDERED.
Dated this 9th day of January, 1979.

/s/ R. Thomas Hill
United States District Judge

Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1662

W. W. BLACKBURN AND JERRY BLACKBURN,
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CRUM AND FORSTER, WESTCHESTER FIRE INSURANCE COMPANY, THE NORTH RIVER INSURANCE COMPANY, INTERNATIONAL INSURANCE COMPANY, COMMONWEALTH COUNTY MUTUAL INS. CO., U. S. FIRE INSURANCE CO. AND FLOYD WEST & COMPANY

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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May 16, 1980

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1662

W. W. BLACKBURN AND JERRY BLACKBURN,
Individually and d/b/a Tiny Blackburn Agency,
Petitioners,

VS.

CRUM AND FORSTER, WESTCHESTER FIRE INSURANCE COMPANY, THE NORTH RIVER INSURANCE COMPANY, INTERNATIONAL INSURANCE COMPANY, COMMONWEALTH COUNTY MUTUAL INS. CO., U. S. FIRE INSURANCE CO. AND FLOYD WEST & COMPANY

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 611 F.2d 102. The order of the United States District Court for the Northern District of Texas is not reported. Both decisions are reproduced in the Appendix of the Petition. Although containing several minor omissions and typographical errors, the decisions as reproduced by Petitioners fairly reflect the holdings of the courts below. However, the trial court judge is the Honorable Robert M. Hill, not "R. Thomas Hill." (Petition p. A-11).

JURISDICTION

Respondents do not dispute the jurisdiction of this Court under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

The issue presented to the Court is quite narrow. It involves only the factual application of the per se rule of illegality under Section 1 of the Sherman Act, 15 U.S.C. § 1, to the unique circumstances of this case:

> 1. Did the action of the Respondents (hereinafter "Defendants") in terminating their insurance agency relationship with Petitioners (hereinafter "Plaintiffs") constitute a per se violation of Section 1 of the Sherman Act?

This case does *not* involve interpretation of the "business of insurance" exception to the Sherman Act as set out in Section 2 of the McCarran-Ferguson Act, 15 U.S.C. § 1012, and as applied by this Court in *St. Paul Fire & Marine Insurance Co. v. Barry,* 438 U.S. 531 (1978). The courts below have not relied on that exception in dismissing the antitrust claim of Plaintiffs. Instead, this case has been decided on the merits by determining that no Sherman Act violation has occurred.

This case does *not* involve review of a Sherman Act violation under the "rule of reason" analysis. Plaintiffs apparently have conceded that they cannot produce evidence of anticompetitive intent or effect in this case to establish an antitrust violation under the rule of reason.

STATEMENT OF THE CASE

The opinion of the Court of Appeals correctly states the facts, taken in the light most favorable to Plaintiffs, as established by the summary judgment evidence in this case.

Basically, this case involves the termination of an insurance agency agreement by a group of related insurance companies (having common ownership and management) because of misconduct by the agency. In short, Plaintiffs were terminated by Defendants for issuing a fire insurance policy after the fire loss had occurred.

Plaintiffs have alleged an illegal boycott by Defendants in canceling their agency agreement. After almost two years of discovery and a full evidentiary hearing, the District Court granted Defendants' Motion for Summary Judgment on the ground that the termination of Plaintiffs was not a violation of the Sherman Act under either the per se rule or a rule of reason analysis. The Court of Appeals for the Fifth Circuit affirmed.

As noted by the Fifth Circut, Plaintiffs have pending in Texas state court an action for breach of contract arising out of the same termination made the basis of the antitrust claim. 611 F.2d at 103 n.3.

REASONS FOR DENYING THE PETITION

I.

The Decision Below Is Clearly Correct

Although "group boycotts" may be considered per se violations of the antitrust laws, certain analysis is required before that label can be applied. Accordingly, in the words of Justice Cardozo, we must not be ruled by the "tyranny of labels" under which "another situation is placed under the rule because it is fitted to the words, though related faintly, if at all, to the reasons that brought the rule into existence." *Snyder v. Massachusetts,* 291 U.S. 97, 114 (1934).

This admonition against the "tyranny of labels" is especially applicable in analyzing antitrust claims such as the

one at bar. As noted by the Fifth Circuit in *Yoder Brothers, Inc. v. California-Florida Plant Corp.*, 537 F.2d 1347, 1364 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977):

> To label an arrangement a group boycott, however, is merely to state a conclusion. In order to determine whether or not the label fits, it is necessary to ascertain whether the presence of exclusionary or coercive conduct warrants the view that the arrangement in question is a naked restraint of trade.

The per se rules were established to outlaw anticompetitive conduct which is a "naked restraint of trade." *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963); *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958). Before the challenged conduct is termed per se illegal, the courts must determine whether its purpose and effect are inherently anticompetitive. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979); *Continental T.V., Inc. v. GTE Sylvania*, 433 U.S. 36 (1977).

The courts below correctly refused to apply the per se rule in this case because there is absolutely no factual showing of any anticompetitiveness in connection with the Defendants' actions.

The record in this case effectively rebutted the existence of any anticompetitive purpose of, or effect from, the termination of the Plaintiffs in this case. The Agency-Company Agreement between the Plaintiffs and Defendants was terminated as a result of the Plaintiffs' unsatisfactory conduct. That Plaintiffs wrote a fire insurance policy attempting to bind one of the Defendants after the fire loss had occurred constituted ample business justification for the Defendants' actions in this case. No anticompetitive animus could be shown.

Likewise, the summary judgment proof demonstrated no anticompetitive effect. If anything, interbrand competition was enhanced after the termination as Plaintiffs became agents for one of Defendants' competitors.

II.
There Is No Conflict of Decisions

Without regard to competition, Plaintiffs contend that the per se rule should apply in this case based on *Klor's v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) and *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963).

However, *Klor's* and *Silver* are materially distinguishable from the case at bar. The critical factual difference stems from the competitive position of the alleged boycotters. As correctly noted by the Court of Appeals in this case, both *Klor's* and *Silver* involved boycotts in which at least some of the conspirators were on the same level of competition as the plaintiff. The alleged boycott in this case contains no such horizontal aspect.

In *Klor's*, the refusal to deal involved the participation of many entities throughout the distribution chain of home appliance products. In particular, a key conspirator in the boycott of the plaintiff was Broadway-Hale Stores, Inc., a direct retail competitor of the plaintiff. Because of the inherent anticompetitive purpose and effect involved when a competitor is eliminated, that conspiracy was held to be per se illegal.

In contrast, none of the alleged boycotters in the present case are on the same competitive level as, or in any way directly compete with, the Plaintiffs. Because of the lack of this horizontal aspect, it cannot be said that the termination of the Plaintiffs was inherently anticompetitive, either in purpose or effect. Thus, the basis for applying the per se rule in *Klor's* is clearly absent in this case.

While Plaintiffs complain that the Court of Appeals misapplied the *Klor's* holding, no authority is cited or argument made in support of that position. (Petition pp. 6-7). To the contrary, the opinions of this Court and the lower courts consistently interpret the per se rule of *Klor's* as applying to boycotts with horizontal aspects.[1]

Likewise, the reasons for applying the per se rule in *Silver v. New York Stock Exchange,* 373 U.S. 341 (1963), are not present in the case at bar. Plaintiffs incorrectly state that *Silver* involved no horizontal conspiracy. (Petition p. 7). However, the facts show that *Silver* involved a classic combination of traders operating at a single level of distribution to exclude a direct competitor from the market. The boycotting entity in *Silver,* the New York Stock Exchange, was comprised of competing securities dealers, as

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[1]*E.g., United States v. Arnold, Schwinn & Co.,* 388 U.S. 365, 372-73 (1967); *White Motor Co. v. United States,* 372 U.S. 253, 263 (1963); *Smith v. Pro Football, Inc.,* 593 F.2d 1173, 1178 n.18 (D.C. Cir. 1979); *Harold Friedman, Inc. v. Thorofare Markets, Inc.,* 587 F.2d 127, 142 n.57 (3d Cir. 1978); *Gough v. Rossmoor Corp.,* 585 F.2d 381, 388 (9th Cir. 1978), *cert. denied,* 440 U.S. 936 (1979); *Ackerman-Chillingworth v. Pacific Electrical Contractors Association,* 579 F.2d 484, 490 n.7 (9th Cir. 1978), *cert. denied,* 439 U.S. 1089 (1979); *Oreck Corp. v. Whirlpool Corp.,* 563 F.2d 54, 58 (2d Cir. 1977), *cert. denied,* 439 U.S. 946 (1978); *Mutual Fund Investors, Inc. v. Putnam Management Co., Inc.,* 553 F.2d 620, 626 (9th Cir. 1977); *Moore v. James H. Matthews & Co.,* 550 F.2d 1207, 1220 (9th Cir. 1977); *Coleman Motor Co. v. Chrysler Corp.,* 525 F.2d 1338, 1346 n.13 (3d Cir. 1975); *Bowen v. New York News, Inc.,* 522 F.2d 1242, 1257 (2d Cir. 1975), *cert. denied,* 425 U.S. 936 (1976); *Beltronics, Inc. v. Eberline Instrument Corp.,* 509 F.2d 1316, 1320 (10th Cir. 1974), *cert. denied,* 421 U.S. 1000 (1975); *Worthen Bank & Trust Co. v. National BankAmericard, Inc.,* 485 F.2d 119, 127 (8th Cir. 1973), *cert. denied,* 415 U.S. 918 (1974); *E. A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Committee,* 467 F.2d 178, 186-87 (5th Cir. 1972), *cert. denied,* 409 U.S. 1109 (1973); *Industrial Building Materials, Inc. v. Interchemical Corp.,* 437 F.2d 1336, 1341-42 (9th Cir. 1970).

made clear in the District Court's opinion. *Silver v. New York Stock Exchange,* 196 F. Supp. 209, 211 (S.D.N.Y. 1961). Consequently, when the Exchange terminated the plaintiff's communication connections, and thereby forced him out of business, it was acting on behalf of its members, the competing dealers. In fact, *Silver* has only horizontal aspects, since there was no boycott by an entity at a different level of the distribution chain.

Accordingly, the courts below have faithfully followed the decisions of this Court in disposing of this case.

CONCLUSION

Plaintiffs have made no showing of any special or important reason for granting writ of certiorari in this case. The courts below correctly applied well-settled law to the unique facts of this case. The decisions of the courts below are, in all respects, consistent with the opinions of this Court and all Courts of Appeals. Accordingly, the Petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Ernest R. Higginbotham, one of the counsel for Respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the nineteenth day of May, 1980, I served the foregoing BRIEF FOR RESPONDENTS IN OPPOSITION on Petitioners by depositing in a United States post office three (3) copies thereof, with first class postage prepaid, duly addressed to John Wright, Esq., and George McCall, Esq., P.O. Box 1777, Grand Prairie, Texas 75051, counsel for Petitioners.

Ernest R. Higginbotham